WESTERN AUSTRALIA

FORFEITURE OF MINING TENEMENTS – HOW FAR BACK CAN YOU GO?*

***Richmond v Ynema* (2004)** WAMW 14, Perth Warden's Court, Warden Calder SM, 17 September 2004

Applications for forfeiture of mining tenements – application to strike out particulars – allegations of false form 5s (operations report – expenditure on mining tenement) filed – relevance of past expenditure.

Application of forfeiture

MH Ynema held mining leases 80/291, 80/322 and 80/309. The plaintiff, WR Richmond, lodged plaints for forfeiture. These plaints were initially filed with the simple allegation that there had been a failure to comply with expenditure conditions for the relevant year by not spending the minimum amount required by regulation 31 for each lease. Further and better particulars were provided alleging that 'false expenditure claims' had been made for previous years, including, among other things, that:

- claimed work was not done,
- expenditure was not made or incurred other than in respect of rates or rent,
- certain claimed expenditure items were not in fact claimable and
- 'metal detecting' was not in any event claimable.

At the commencement of the hearing, the defendant applied to have the particulars relating to past expenditure struck out as not being relevant. In the alternative, the defendant argued that only non-compliance with the expenditure conditions for the relevant expenditure year could be considered and therefore that all other evidence should be discarded.

Relevance of non-compliance in previous years

The defendant argued for a narrow construction of the relevant provisions of the *Mining Act* 1978 ('the Act'), most particularly sub-sections 98(2) and 98(5). They made reference to past cases considering similar issues under the Act (eg *Savage v Teck Exploration Ltd*, unreported; Full Court Supreme Court of Western Australia, 16 September 1988) and equivalent provisions in SA legislation (eg *Pacminex (Operations) Pty Ltd v Australian (Nephrite) Jade Mines Pty Ltd* (1974) SASR 402). The fundamental premise of their case was that only expenditure in the year that is the subject of the plaint for forfeiture can be considered. They further argued that it would render proceedings unworkable and overly lengthy if previous years' expenditure reports were to be examined, and raised the question of 'how far into the past such an audit should extend'.

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The plaintiff argued to the contrary that 'Under the Western Australian Act the Warden can take into account anything that is relevant and not just the (explicit) requirements of the Act'. In support of this proposition they referred to various authorities including *Craig v Spargos Exploration NL*, Warden Reynolds, Unreported Warden's Court Leonora, 22 December 1986, Volume 2 Folio 23 and *Rose v Goldtime Australia Pty Ltd* (2004) WAMW 8 Warden Edwards SM.

The Warden found in favour of the plaintiffs. He commented that '*It has long been the practice for parties to proceedings for forfeiture before the Warden to be permitted to introduce evidence of the expenditure history of the subject tenement and to invite the Warden to draw from that history inferences concerning the issue of whether or not in the circumstances of the case forfeiture was justified.'*

The Warden further found that '*non-compliance with the expenditure requirement concerning any previous year in the life of a tenement may be a relevant circumstance of the case and, therefore, relevant to the issue of sufficient gravity'.* Sub-section 98(5) establishes that the Warden is not to make a recommendation about forfeiture unless satisfied that the non-compliance is 'of sufficient gravity'.

The Warden further commented that he thought that such an approach was consistent with the self-policing policy of the legislation, and with the compulsory reporting requirements of the legislation.

Cannot hide behind false declaration

In essence, he found that as the legislation required the parties to reliably and honestly report on expenditure activity and similar matters, it would undermine the integrity of the operation of the legislation if parties were able to 'hide' behind false declarations or reports, and not allow those reports or declarations to be challenged or tested in proceedings for forfeiture and the like, even some years after the event.

On this basis, the application to strike out particulars was dismissed.

NB: The Mining Amendment Act 2004*, assented to by the Western Australian Parliament on 3 November 2004, but not yet proclaimed at the time of writing, amends section 98 of the Act. The amendments establish that applications for forfeiture are determined administratively, not in the wardens court. However the principles established in this case will remain relevant to such applications.*